In The
Supreme Court of the United States
October Term, 1995

C. MARTIN LAWYER, III,

Appellant,

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

WHETHER FLORIDA SENATE DISTRICT 21 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BY UNLAWFULLY ACHIEVING A RACE - CONSCIOUS RESULT.

1. **Whether the District Court Order applied the legal standard set forth in *Miller v. Johnson* in approving the redistricting plan (Settlement Plan 386) of Florida Senate District 21.**

2. **Whether the District Court's redistricting by use of mediation, with the branches of Florida State government represented by attorneys in closed door caucuses, violated the separation of powers and federalism.**

3. **Whether redistricting Settlement Plan 386 violates the Equal Protection Clause of the United States Constitution.**

PARTIES TO THE PROCEEDING

The following party is one of the Plaintiffs below and is the Appellant before this Court:

C. Martin Lawyer, III

The following parties were other Plaintiffs below and are Appellees before this Court:

Robert Scott

Edna Sims

Earl James

The following parties were Defendants below and are Appellees before this Court:

United States Department of Justice

State of Florida

The following parties were Intervenors below and are Appellees before this Court:

Florida Senate

Florida House of Representatives

Florida Secretary of State

James T. Hargrett, Jr.

Moease Smith and others who reside in the general geographic area of Tampa Bay

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OPINION BELOW

The opinion of the three-judge district court (App. B, *infra*, 3a - 20a), entitled "Final Order" was entered on March 19, 1996, and is not yet reported.

JURISDICTION

The Final Order of the three-judge district court from which appeal is taken directed the apportionment of District 21 and surrounding districts of the Florida Senate--a statewide legislative body within the meaning of 28 U.S.C. § 2284(a). Direct appeal from such an order is authorized by 28 U.S.C. § 1253; and 28 U.S.C. § 2101 prescribes a 30-day limit for taking the appeal. The Notice of Appeal (App. A, *infra*, 1a - 2a) filed April 16, 1996 herein is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Sec. 1. ...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws.

The Tenth Amendment to the constitution of the United States provides, in relevant part:

> The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Sections 7, 8, and 16 of Article III of the Florida Constitution, because of their length, are set out in Appendices G, H, I, *infra*, at 32a - 36a.

STATEMENT

A. Proceedings Below

The April 14, 1994 Complaint to declare unconstitutional Florida Senate District 21 (Plan 330, App. D, *infra*, 29a) as a product of unlawful racial gerrymandering was filed by Appellant and five other plaintiffs, all of whom were then represented by the law firm of Foley & Lardner. For purposes of this appeal, the relevant portions of the Complaint's allegations were:

> 12. Senate District 21 was deliberately drawn in an irregular fashion in order to ensure that at least fifty-one percent (51%) of the population of the district was comprised of minorities. Senate District 21 was...drawn specifically to encompass members of minority groups with divergent interests residing in several different communities....
>
> 13. The configuration produced by the Reapportionment Plan is so irregular that it clearly cannot rationally be understood as anything other than an attempt to segregate the races for purposes of voting....

Appellant is of the Caucasian/White race and resides within both the district challenged in the Complaint and within the "Settlement Plan" district (Plan 386, App. E, *infra*, 30a) challenged by this appeal. *See, United States v. Hayes*, 515 U.S. __, 115 S.Ct. ____, 132 L.Ed. 2d 635 (1995). One of the original plaintiffs died; and another moved out of the area. The only other plaintiffs (Robert Scott, Edna Sims, and Earl James) are all of the

African-American/Black race and reside outside (across the street from) the district challenged in the Complaint and within the Settlement Plan district challenged.

Defendants below were the United States Department of Justice and the State of Florida. The three-judge court permitted the following five non-parties to intervene:

(1) Florida Senate
(2) Florida House of Representatives
(3) Florida Secretary of State
(4) James T. Hargrett, Jr., Incumbent Senator, District 21
(5) Moease Smith and others, all African-American or Hispanic residents of the general area who participated in prior redistricting lawsuits.

After the filing of the Complaint, this Court decided *Miller v. Johnson*, 515 U.S. ____, 115 S.Ct. ____, 132 L.Ed. 2d 762 (1995). Despite the *Miller* decision, there was "no spontaneous effort of the State of Florida" to alter District 21 in response to *Miller*. App. B, *infra*, at 5a.

At the suggestion of the attorney for the Florida Senate, the District Court

> concluded that mediation offered a preferable and feasible alternative to the uncomfortable intervention inherent in federal judicial resolution of issues affecting state government.

Id.

During the mediation process, Appellant and the Foley & Lardner law firm filed a joint motion for the firm to withdraw as Appellant's attorney because his interests became divergent from the other (African-American) plaintiffs. Although no order of the district court approved this motion, Appellant, an attorney,

appeared on his own behalf thereafter, and Foley & Lardner represented the African-American plaintiffs exclusively.

Subsequently, the mediator designated by the District Court reported to the court the "apparent resolution of this dispute." App. B, *infra*, at 5a, n. 1. At a hearing scheduled for September 27, 1995, Appellant objected both to his continuing representation by Foley & Lardner and to the putative settlement. *Id.*

After the September 27 hearing, the mediation proceeded, and a proposed resolution resulted. *Id.* The Florida House of Representatives, who was admitted as a party at the September 27 hearing, concurred with the proposed resolution. *Id.* Appellant Lawyer objected to the proposed resolution. *Id.*

At a hearing held November 2, 1995 all parties except Appellant Lawyer indicated their consent to the terms of the proposed resolution and filed the "Settlement Agreement". *Id.* at 5a-6a. On that date, District Judge Merryday gave tentative approval to the Settlement Plan and set a "fairness hearing" before the three-judge court on November 20, 1995. *Id.* at 6a-7a.

On November 18, 1995, the settling parties filed two pleadings. They filed a "Joint Motion to Approve Settlement" seeking approval of Plan 386 and a "Notice of Filing Map of Settlement Plan and Statistical Data". The map of Plan 386 is attached hereto at App. E, *infra*, at 30a.

On November 10, 1995, Appellant filed his "Plaintiff Martin Lawyer's Motion to Disapprove November 2, 1995 'Settlement Agreement'". App. C, *infra*, 21a-28a. The memorandum supporting this motion argued that the Settlement Plan constituted racial gerrymandering and, including the statistical tables attached thereto, addressed the requirement of *Miller v. Johnson, supra*, at 515 U.S. __, 115 S.Ct. ____, 132 L.Ed.2d 779-780 (1995) (discussed in detail, *infra)* that a plaintiff use "circumstantial evidence of a district's shape and demographics"

to show that race was the predominant factor. *Id.* at 22a-28a. Appellant's memorandum also specifically addressed the Supreme Court's requirement for a plaintiff to show that traditional race-neutral principles were disregarded. *Id.*

Lawyer referred to the statistical data supplied to him by the settling parties and which is located in their subsequently-filed November 18, 1995 notice. This data, and extrapolations, are found at App. C, *infra*, at 26a-28a.

Lawyer pointed out in his memorandum that, although the actual percentage of Black voting age population (V.A.P.) for the three counties in question was only 8% (*Id.* at Table 1, 26a), the Settlement Plan contained a Black percentage of V.A.P. of 36.2% (*Id.* at Table 2, 27a).

Secondly, as Lawyer pointed out, the Settlement Plan increased the Black percentage of V.A.P. in Hillsborough County from 10.9% to 30.5%. *Id.* at Tables 1 and 2, at 26a, 27a. For Manatee County, the percentage was increased from 5.9% to 32%; and for Pinellas County, the percentage was increased from 6.1% to 58.5%, an increase of 959%. *Id.*

Third, Lawyer noted that Table 3 at 28a indicates that, in order to obtain high percentages of Black persons within the Settlement Plan district, the architects of the plan included well over half of the Black voting age residents in Pinellas and Manatee Counties. *Id.* at 23a, citing Table 3 at 28a. Thus, Table 3 indicates that the Settlement Plan includes 64.4% of Pinellas County's Black V.A.P. and 74.8% of Manatee County's Black V.A.P. *Id.*

Lawyer further pointed out that the Settlement Plan violated the principle of contiguity because it reached over the unpopulated area of Tampa Bay in order to include Pinellas County within the district. *Id.* at 24a. In addition, Lawyer stated that the inclusion of the portions of Manatee and Pinellas Counties violated

the race-neutral principle of compactness inasmuch as compactness could have been achieved by expanding the area around the core of Hillsborough County within the district. *Id.*

At no time did the State defendants admit liability. In fact, they specifically denied the assertion of the unconstitutionality of District 21. App. B, *infra*, at 10a, n.3.

The three-judge court heard argument from all parties and intervenors at the November 20, 1995 hearing and took the matter under advisement. At this hearing, Appellant expressly and specifically presented the argument contained his above-cited motion, including the statistical analysis and reference to the enlarged map of the Settlement Plan present in the courtroom.

The court's "FINAL ORDER" of March 19, 1996 (discussed in detail, *infra*) approved the Settlement Plan. App. B, *infra*, 3a-20a. This timely appeal followed on April 16, 1996. App. A, *infra*, 1a-2a.

B. The District Court Decision

After summarizing the aforementioned procedural history, the District Court discussed its authority to re-draw the State legislative boundary in the instant case in the absence of a "specific determination of the controlling constitutional issue." App. B, *infra*, at 7a. The court adopted the procedure utilized in an employment discrimination class action case and stated that its Order was

> in the nature of a hybrid consent decree that disposes of liability by consent and affords a remedy resulting from a partial settlement and an adversary hearing similar to a fairness hearing.

Id. at 18a, n. 4.

The District Court emphasized that "the law allows for a consensual remedy in the absence of a public *mea culpa* by a litigant", and that the court has a responsibility to protect against the "excessive (even intoxicating) acquisition of effective power over public affairs by a private individual with unspecified motives." *Id.* at 8a, n. 2.

The court stated that it cannot act as a "hostage to private interests" and noted that,

> Plaintiff Lawyer's complaint sought to have the state of Florida replace District 21 with a constitutional district. He got it.

Id.

The District Court proceeded to discuss the characteristics of then-current District 21. *Id.* at 11a. The court concluded that, measured against the standard prescribed by *Miller, supra,* the pleadings presented a justiciable dispute which implicated important governmental interests which the parties were at liberty to settle. *Id.* at 12a-13a.

The Order then, at 13a-14a, discussed Plan 386 (Settlement Plan). The Order recited that the "community" issue[1] was "prominent" because

> part of proposed District 21 is physically separated by a natural geological peculiarity (Tampa Bay) from the balance of the proposed district and because more than one county is included in proposed District 21.

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[1] *I.e.,* the "community of interest" element of traditional race-neutral districting principles approved by this court in *Miller, supra,* at 515 U.S. ___, 115 S.Ct. ___, 132 L.Ed.2d. 780-782.

Id. at 13a.

The Court noted that this was a "stubborn problem" and, after discussing this issue for two pages, concluded that a community is defined by the "consent" of its members. *Id., separately,* at 13a, 14a. The lower court, thus, concluded that there is no "cognizable, constitutional objection" to the Settlement Plan. *Id.* In so concluding, the court stated that proposed District 21 was "demonstrably benign and satisfactorily tidy, especially given the prevailing geography." *Id.* at 15a.

The Court cited the lack of objections, despite extensive media coverage, by any persons other than Appellant and a former State Senator to the proposed District 21 at the November 20, 1995 "fairness" hearing as compelling the conclusion that

> common sense and the history of this litigation suggest that the residents of District 21 regard themselves as a community and experience considerable comfort with the proposed resolution.

Id. at 15a.

The District Court then devoted the remainder of its opinion to expressing the view that deference should be given to the State legislature in districting matters. *Id.* at 15a-17a. For example, at 16a, the court stated,

> ...the limited role of a federal court is to ascertain whether the legislatively described district is among that boundless number of possible and constitutional districts and not among the equally boundless number of possible and unconstitutional districts.

The court then noted, without citing any statistics, that Plan 386 is "racially less recognizable and distinctive" than Plan

330, the plan challenged by the Complaint. *Id.* The court stated that the new plan reduces the percentage of minority constituents and more closely approximates the racial features of the larger geographic region surrounding Tampa Bay. *Id.* The boundaries of Plan 386 are "less strained and irregular" than present District 21. *Id.* at 17a.

Thus, the District Court concluded at 17a,

> ...Plan 386 offers to any candidate, without regard to race, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat–neither of which is properly coerced or precluded by the state, the court, or the Constitution.

The Order concluded by finding that the legislature's view controlled, and that Plan 386 passed any pertinent test of constitutionality and fairness. *Id.* The Order did not at all address the statistical proof offered by Appellant or even any of the statistical evidence supplied to the trial court by the settling parties.

THE QUESTIONS ARE SUBSTANTIAL

The Appellant seeks reversal of the District Court's Final Order in which the District Court accepted Settlement Plan 386, which modified and redistricted District 21 of the Florida Senate. The District Court erred by failing to rule that then-existing District 21 (Plan 330) was unconstitutional. The court further erred by utilizing mediation wherein attorneys for the legislative and executive branches of State government negotiated a substitute plan (Plan 386), bypassing the legislative process. Ultimately, Plan 386, is unconstitutional for the same reasons as its predecessor. The District Court failed to apply the standards articulated by this Court in *Miller v. Johnson, supra*; and Plan 386 violates the Equal Protection clause.

1. The District Court Order failed to apply the legal standard set forth in *Miller v. Johnson* in approving the redistricting plan (Settlement Plan 386) of Florida Senate District 21.

The central purpose of the Equal Protection Clause is to prevent the States from purposefully discriminating between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. ____, ____, 113 S.Ct. 2816, _____, 125 L.Ed. 2d 511, 525 (1993) (citation omitted). "It's central mandate is racial *neutrality* in governmental decisionmaking." *Miller, supra,* at 515 U.S. ____, 115 S.Ct. _____, 132 L.Ed. 2d 771 (1995) (emphasis added).

The essence of an "equal protection" racial gerrymandering claim, including appellant's herein, is that

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent

> only the members of that group, rather than their constituency as a whole.

Shaw, supra, at 509 U.S. __, 113 S.Ct. ____, 125 L.Ed. 2d 529.

Thus, appellant here contends that the Settlement Plan districting of Senate District 21 was not race-neutral. and that the driving force behind its creation was to effectuate the perceived common interests of one racial group--African-Americans.

This Court in *Miller* explicitly outlined the correct analysis of proof upon the issue of whether a legislative district is racially gerrymandered. *Miller, supra,* at 515 U.S. __, 115 S.Ct. ____, 132 L.Ed. 2d 779-780. The Court stated as follows:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that **[780]** the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

This Court then explicitly approved the analysis of the *Miller* District Court. *Id.* at 515 U.S. ____, 115 S.Ct. ____, 132 L.Ed. 2d 780. This Court recited that the *Miller* District Court found that

> it was "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the *drawing of narrow*

> *land bridges* to incorporate within the District outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. 864 F.Supp. at 1375; see *id.*, at 1374-1376. Although by comparison with other districts the geometric shape may not seem bizarre on its face, *when its shape is considered in conjunction with its racial and population densities*, the story of racial gerrymandering seen by the District Court becomes much clearer.

Id. Emphasis added.

This Court stated that although this evidence was "quite compelling", it was not necessary to determine whether it was, standing alone, sufficient to establish a constitutional violation because the district court had additional evidence that the General Assembly of the State of Georgia was "motivated by a predominant overriding desire to assign black populations to the Eleventh District. *Id.*

The circumstantial elements of proof, as announced by the District Court in *Johnson v. Miller, supra,* and adopted by this Court in *Miller, supra,* are sufficient to prove legislative intent to gerrymander a legislative district because

> legislative intent is notoriously difficult–if not logically impossible–to ascertain, and in redistricting cases, the district itself may provide the only firm evidence, albeit circumstantial, of that intent.

Johnson v. Miller, supra, at 864 F. Supp. 1374 (footnote, citations omitted).

In the case at bar, the Appellant relies upon this circumstantial evidence because the mediator conducted caucuses in

private and behind closed doors, the result of which was a proposed resolution in the form of Settlement Plan 386, to which Appellant objected.

Regardless of the legality of the procedure by which Settlement Plan 386 was produced[2], it is clear that the District Court failed to apply the correct legal standard outlined above. Indeed, the District Court did not require the Settlement Plan to pass constitutional muster and, ultimately, approved Settlement Plan 386 simply because it was better than its predecessor.

The district court ignored Appellant's statistical proof and specific argument directed to the *Miller* requisites regarding compactness, contiguity, and respect for political subdivisions. What is worse, the district court utilized a definition of "community of interest" which substantially conflicts with the standard elucidated by this Court in *Miller, supra.*

Specifically, the district court herein hinged its entire conclusion that its approval of Settlement District 21 complied with *Miller* upon the false premise that those who reside within a challenged district can determine that there is such a "community"

The District Court acknowledged that what it referred to as the "community" issue was prominent because the proposed district was physically separated by Tampa Bay and because more than one county was included. App. B, *infra,* at 13a. However, the District court resolved this "stubborn problem" by stating that a "community is based...on the society and consent of its members." *Id.* The court noted that, despite the publicity surrounding the litigation and publication of notice of the so-called fairness hearing, no resident of District 21 arose to object at the hearing except for Appellant. *Id.* at 15a.

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2 The legality of the procedure will be addressed in Point 2 herein.

The lower court also noted that the Appellant noted in his deposition had expressed contentment with the incumbent Senator in District 21.[3] *Id.* The court therefore concluded that "common sense and the history of this litigation suggest that the residents of District 21 regard themselves as a community and experience considerable comfort with the proposed resolution." *Id.*

By this logic, all persons of a particular racial, ethnic, or religious identity could "consent" to form a legislative district if they obtained approval by the attorneys for the legislature, regardless of the configuration of the district. This type of voting rights "racial stereotyping" was specifically condemned by this Court in *Miller* at 515 U.S.___, 115 S.Ct. ___, 132 L.Ed. 2d 782.

However, ultimately, the District Court approved Plan 386 because it was the will of the legislature. The court stated that, "while assisted tellingly by mediation, proposed District 21, like present District 21, is primarily a legislative action and is advanced to this stage by this court preeminently for that reason." *Id.* at 16a. The court stated that "absent an offense against the Constitution, the court necessarily respects the will of the legislature as manifested by the consent of the President of Florida's Senate and the Speaker of Florida's House of Representatives. *Id.*

Thus, the District Court failed to address the legal effect of the violation of race-neutral districting principles presented by Settlement Plan 386. Rather than doing so, the court deferred to the "legislative" action which was the result of the mediation process devised and implemented by the Court. Then, after ignoring the legal effect of the uncontroverted evidence, the lower

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[3] The District Court does not cite any page or line of Appellant's deposition to support this statement. Appellant denies the substance of the statement and any implication that Appellant is satisfied that Senator Hargrett can effectively represent Appellant in a racially gerrymandered district.

court blithely accepted Plan 386 because it was the "will of the legislature". *Id.*

The reason for the trial court's unprecedented procedure and analysis is clear from the decision itself. The District Court concluded that "mediation offered a preferable and feasible alternative to the uncomfortable intervention inherent in federal judicial resolution of issues affecting state government." *Id.* at 5a. The court was concerned about the "risk of offense" (*id.* at 12a) and stated that a public body should not have to, in effect, admit guilt in order to settle the case. *Id.* at 8a, n. 2.

In the end, the District Court's approval of the Settlement Plan was based more on the court's platitudes and homilies, rather than any legal analysis or application of any principles articulated by this Court in *Miller*.

Although the District Court took pains to avoid offending the Florida Legislature, it was not so gentle with Appellant. Instead the lower court castigated the Appellant under the guise of articulating legal principles.

Noting that Appellant Lawyer had demanded an adjudication that District 21 (Plan 330) was composed unconstitutionally, the court again emphasized that the "law allows for a consensual remedy in the absence of a public *mea culpa* by a litigant--as well it should." *Id.* The court then stated in pertinent part as follows:

> Of course, parties cannot connive to achieve narrow political interests by lodging complaints in a federal court, contriving to "settle" the litigation, and thereby affecting the interests of the public by manipulation of the federal judiciary. It is primarily for that reason that the court has a responsibility to telescopically inspect the controversy and guard against any disingenuous adventures. Among the adventures against which the court

> serves as a protector is the excessive (even intoxicating) acquisition of effective power over public affairs by a private individual with unspecified motives. In short, a court resolving a governmental or intrinsically public matter cannot act as a hostage to private interests....Plaintiff Lawyer's complaint sought to have the state of Florida replace District 21 with a constitutional district. He got it.

Id.

With all due respect to the District Court, this brand of scorn and derision has no place in a proceeding wherein a litigant asserts his right to equal protection of the law in a United States District Court. Regardless of the court's displeasure, the Appellant was not deserving of this treatment because he refused to agree to a brokered deal which still produced a plan which was as unconstitutional as its predecessor. The lower court should have spent more time applying the principles of the *Miller* case to Plan 386 and less time vilifying the Appellant.

2. **The District Court's redistricting by use of mediation, with the branches of Florida State government represented by attorneys in closed door caucuses, violated the separation of powers and federalism.**

The District Court did not, in its Final Order, declare then-current District 21 (Plan 330) to be unconstitutional or remand the case to the Florida Legislature for the adoption of a new plan. Instead, after finding that the plaintiffs had presented a "cognizable, constitutional dispute concerning [then-]present District 21, which bears at least some of the conspicuous signs of a racially conscious contrivance", the court designated a mediator to resolve the dispute.

The resolution of the case by mediation precluded any additional evidence of motivation because the typical legislative process was substituted with a court-ordered mediation process. Clearly, the procedure adopted by the district court was an invalid exercise of executive and legislative power.

Separation of powers is fundamental to our system but does not arise from any provision of the Constitution. Instead, the principle derives from limits imposed by constitutional provisions. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934). Under the doctrine of separation of powers, our government is composed of three separate but co-equal branches. Consequently, unless otherwise expressly provided or incidental to the powers conferred, the judiciary cannot exercise either executive or legislative power. *Springer v. Philippine Islands*, 277 U.S. 189, 201-202 (1928).

As James Madison stated in *The Federalist No. 47*, "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, and the judge would then be the legislator."

The United States Constitution, Amendment X, embodies the principle of federalism in the words, "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." In 1992, this Court stated as follows:

> ...the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 2431, 120 L.Ed. 2d 120, 154 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722 (1991) (Blackmun, J., dissenting)

The Florida Legislature must adopt a redistricting plan in the same manner as other laws. See, Fla. Const. Art. III, §§ 7, 8, 16, *infra*, App. G, H, I. In *Wise v. Lipscomb*, 437 U.S. 535 (1978), this Court stated as follows:

> When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the Legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.

Id. at 437 U.S.540.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court stated as follows:

> Judicial relief is only appropriate "when a legislature fails to [redistrict] according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Id. at 377 U.S. 586.

In *Connor v. Finch*, 431 U.S. 407 (1977), this Court stated as follows:

> A State Legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess

> no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.

Id. at 431 U.S. 415.

Furthermore, even when a federal court properly devises and imposes a reapportionment plan, it only does so "pending later legislative action." *Wise, supra*, at 437 U.S. 540. In the instant case, the District Court neither declared the then-existing plan (Plan 330) unconstitutional nor remanded it to the legislature to await legislative action.

The District Court violated the principles of separation of powers and federalism by, in effect, convening its own legislative session (*i.e.*, the mediation) which produced a new reapportionment plan without any subsequent legislative action by the government of the State of Florida. It must be noted that although the Governor was apparently represented by the Attorney General, at no time was Settlement Plan 386 ever signed into law by the Governor.

The procedure in the case at bar amounted to the creation of legislation by the federal judiciary in the name of avoiding offense to the public official involved. Under the guise of obeying the will of the legislature, the District Court exercised the power of the legislature and the governor of the State of Florida.

This issue was not raised below because Appellant Lawyer was represented by counsel who embraced the idea of a mediated "settlement". Indeed, Appellant Lawyer objected to the proposed settlement and his continued representation by Foley & Lardner as of September 27, 1995. App. B, *infra*, at 5a, n.1.

The District court acknowledged in its decision that Appellant Lawyer not only objected to Settlement Plan 386 (*id.*, at

18a, n. 4), but also demanded an adjudication that then-existing District 21 was composed unconstitutionally. *Id.* at 8a, n. 2.

Furthermore, regarding the District Court's proceeding to the remedy stage itself, Appellant Lawyer, representing himself at the November 2, 1995 Pre-Trial Conference, stated as follows:

> So what I would ask the court to do...is to not treat the motion or the request for settlement as relevant, because it is not consented to by all parties, and proceed to the pretrial. I'm prepared to go forth in trial on this.
>
> If there is a stipulation among all parties present and all parties have the authority and power to do that, to stipulate that the current district does violate the equal protection clause of the Fourteenth Amendment of the United States Constitution, then I would agree in part with what Mr. Hill [Florida Senate counsel] says, which is that we would then proceed to a remedy phase. *But I certainly would object to the manner in which it would proceed.*
>
> *I would submit* that it would be--well, *that the court would*--may very well, as Judge Tjoflat seemed to indicate, *defer to the State of Florida in some other fashion...*

Transcript of Pre-Trial Conference, at 15, emphasis added.

The above comments by Appellant make clear that Appellant Lawyer objected to the procedure adopted by the District Court.

However, even if the issue of separation of powers and federalism was not presented by Appellant Lawyer to the district court, it is clear that this Court has the power to notice plain error

and decide a case on grounds not previously raised where the errors "seriously affect the fairness, integrity or public reputation of public proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *Silber v. United States*, 370 U.S. 717, 718 (1962); *Connor v. Finch*, 431 U.S. 407, 421, n.19 (1977) (applied in case involving court-ordered reapportionment plan).

In the case at bar, the District Court converted what would have been an open process conducted by the Florida Legislature, into a court-sponsored "mediation" with the closed-door caucuses conducted by attorneys for the branches of state government. Aside from the fact that the procedure violated the separation of powers and federalism, it constituted an egregious breach of the fairness, integrity, and public reputation of public proceedings which normally attend the enactment of state legislation. This is especially the case where a core right such as voting is involved.

Appellant emphasizes that, even should this Court not consider the constitutionality of the procedure by which the lower court approved Settlement Plan 386, it is clear that Plan 386 violates Appellant's right to equal protection for the reasons articulated below.

3. Redistricting Settlement Plan 386 violates the Equal Protection Clause of the United States Constitution.

It is clear that Settlement Plan does not pass constitutional muster under the Equal Protection Clause as interpreted by this Court in *Miller, supra*. An analysis reveals that the plan is still unconstitutional for the same reasons as its predecessor. Appellant raised the following objections to Plan 386 in his Motion To Disapprove November 2, 1995 Settlement Agreement.

a. Shape

First, the shape of Settlement Plan 386 is bizarre on its face as is evident from the map. It trolls across Tampa Bay in order to incorporate within the new district outlying appendages of Pinellas and Manatee counties containing enclaves of black population in those counties in order to bring them into the district. App. E, F, *infra*, at 30a, 31a.

Appendix F is an enhancement of Appendix E (Settlement Plan 386). Appendix F, as enhanced, was not part of the record below. It is included here in order to accurately depict the waters of Tampa Bay, the Big Manatee River, and the shoreline. It also depicts the fact that the district includes unpopulated areas of water.

b. Respect for Political Subdivisions

In brushing aside the contention that the three counties involved were carved up to maximize the Black voting population, the District court failed to give legal effect to the gross statistical data which would have compelled the conclusion that Plan 386 was unconstitutional. Instead, in the face of these statistics, the District court merely concluded that "Plan 386 reduces the percentage of minority constituents and more closely approximates the racial features of the larger geographic region surrounding Tampa Bay. App. B, *infra*, at 16a.

The fact remains that the shape of Plan 386 and the statistics demonstrate that the shape of the district was dictated by a desire to reach out from Hillsborough County to enclaves of Black voters in other counties to include them in the new district. This is precisely the type of racial gerrymandering this Court disapproved in *Miller*.

Lawyer pointed out in his memorandum that, although the actual percentage of Black voting age population (V.A.P.) for the three counties in question was only 8% (*Id.* at Table 1, 26a), the Settlement Plan contained a Black percentage of V.A.P. of 36.2% (*Id.* at Table 2, 27a).

Secondly, as Lawyer pointed out, the Settlement Plan increased the Black percentage of V.A.P. in Hillsborough County from 10.9% to 30.5%. *Id.* at Tables 1 and 2, at 26a, 27a. For Manatee County, the percentage was increased from 5.9% to 32%; and for Pinellas County, the percentage was increased from 6.1% to 58.5%, an increase of 959%. *Id.*

Third, Lawyer noted that Table 3 at 28a indicates that, in order to obtain high percentages of Black persons within the Settlement Plan district, the architects of the plan included well over half of the Black voting age residents in Pinellas and Manatee Counties. *Id.* at 23a, citing Table 3 at 28a. Thus, Table 3 indicates that the Settlement Plan includes 64.4% of Pinellas County's Black V.A.P. and 74.8% of Manatee County's Black V.A.P. *Id.*

The District Court totally ignored this glaring statistical proof that race was the motivation for the bizarre shape of District 21 in Settlement Plan 386.

c. Contiguity

Lawyer further pointed out that the Settlement Plan violated the principle of contiguity because it reached over the unpopulated area of Tampa Bay in order to include Pinellas County within the district. *Id.* at 24a.

d. Compactness

In addition, Lawyer stated that the inclusion of the portions of Manatee and Pinellas Counties violated the race-neutral principle of compactness inasmuch as compactness could have been achieved by expanding the area around the core of Hillsborough County within the district. *Id.*

e. Community of Interest

This Court stated, "Nor can the State's districting...be rescued by mere recitation of purported communities of interest." *Miller, supra,* at 515 U.S. ___, 115 S.Ct. ___, 132 L.Ed. 2d 781. "Where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates." *Id.* at 515 U.S. ___, 115 S.Ct. ___, 132 L.Ed. 2d 782.

In the instant case, the proponents of Plan 386 included portions of Manatee and Pinellas counties within the district in order to further a black-maximization policy which assumed that Black voters in those counties had a community of interest. This practice was harshly rebuked by this court in *Miller, supra,* at 515 U.S. ___, 115 S. Ct. ___, 132 L.Ed. 2d 786.

The District Court's conclusion that there was a community of interest because no one (other than Lawyer and a former State Senator) objected at the so-called fairness hearing to Settlement Plan 386 is without any analytical or constitutional basis.

Thus, individually and collectively, the standards of analysis enunciated by this Court in *Miller, supra,* and equal protection are violated by Settlement Plan 386.

CONCLUSION

This Court should accept jurisdiction of this appeal, reverse the Final Order of the District Court which approved Settlement Plan 386, and remand to the District Court with instructions to declare Settlement Plan 386 unconstitutional and to thereafter proceed accordingly.

Respectfully submitted.

Robert J. Shapiro*
Counsel for Appellant

C. Martin Lawyer, III, Appellant
Member of the Bar of this Court

* *Counsel of Record*

June 1996

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT SCOTT, C. MARTIN LAWYER, III, *et alia*, Plaintiffs,	*	Filed April 16, 1996
v.	*	Case No. 94-622 Civ-T-23-C
THE UNITED STATES DEPARTMENT OF JUSTICE, etc., *et alia*, Defendants, and	*	THREE JUDGE COURT
THE FLORIDA SENATE, through JIM SCOTT in his official capacity as President of the Florida Senate, Defendant-Intervenor.	*	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that C. MARTIN LAWYER, III, one of the Plaintiffs above-named, hereby appeals to the Supreme Court of the United States from the "FINAL ORDER" of the

three-judge district court, *inter alia* granting the "Joint Motion to Approve Settlement" and denying this Plaintiff's related motions, on March 19, 1996.

This action is taken pursuant to 28 U.S.C. §§ 1253, 2101(b), 2284 concerning apportionment of a statewide legislative body--The Florida Senate.

s/
ROBERT J. SHAPIRO, Esquire
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Counsel for Plaintiff Lawyer

s/
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Plaintiff-Appellant

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT SCOTT, et al.,

Plaintiffs,

v. CASE NO. 94-622-CIV-T-23C

THE UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants.
_____/

Before TJOFLAT, Chief Circuit Judge, NIMMONS, District Judge, and MERRYDAY, District Judge.

FINAL ORDER

MERRYDAY, District Judge

This action began with a complaint filed on April 4, 1994, in which Robert Scott and others sued the United States Department of Justice and the State of Florida and challenged the configuration of District 21 of Florida's Senate. The court permitted intervention by (1) the Florida Senate; (2) Senator James T. Hargrett, Jr., the incumbent representative of District 21; (3) Moease Smith and others, some of whom are residents and some of whom are non-residents of District 21 but all of whom are African-American or Hispanic individuals with an interest in District 21; and (4) Sandra B. Mortham, Florida's Secretary of

State, whose constitutional and statutory responsibility includes the superintendence of Florida's elections.

Florida's House of Representatives sought intervention also but unaccountably declined to announce whether the intervention was in support of, or in opposition to, the current boundaries of Senate District 21. Unable to knowledgeably align the House as a plaintiff or defendant, the court on July 26, 1995, extended to the House the option to appear in either of these capacitates during only the remedial stage (if District 21 were found unlawful). The House elected to immediately appear *amicus*, keeping its view of District 21 largely to itself. (The House's view of District 21 remains elusive because, after alignment as a defendant, the House filed a largely opaque answer to the complaint. Similarly, an affidavit by Peter Rudy Wallace, Speaker of the House, accompanying the settlement proposal is essentially silent on the legality of District 21.)

The complaint alleges that District 21 "was drawn specifically to encompass members of minority groups with divergent interests residing in several different communities" and "is so irregular that it clearly cannot rationally be understood as anything other than an attempt to segregate the races for purposes of voting." The complaint seeks relief under the Fourteenth Amendment to the United States Constitution and 28 U.S.C. § 2412. C. Martin Lawyer, III, is among the plaintiffs who in the initial complaint allege that District 21 is unconstitutional and who seek relief from District 21 as presently drawn. The claims for relief in the complaint require a three-judge panel under 28 U.S.C. § 2284(a).

On January 9, 1995, after the parties' exchange of sundry papers and after a subsequent oral argument, the court denied, among others, motions to dismiss and to transfer. Thereafter, a period of inactivity was permitted for the purpose of awaiting decision by the Supreme court of the United States in two cases of obvious importance to the law governing this controversy. On

June 29, 1995, the Supreme Court resolved *Miller v. Johnson*, _ _U.S. ___. 115 S.Ct. 2475, 132 L.Ed. 2d 762 (1995), and *U.S. v. Hayes*, ____ U.S. ____, 115 S.Ct. 2431, 132 L.Ed. 2d 635 (1995). On July 6, 1995, the court held a status conference to discuss with the parties and other interested persons both the effect of the Supreme court's recent decisions and the future course of this litigation.

During the July 6, 1995, hearing, the parties and others responded to inquiries from the court by announcing that they anticipated no spontaneous effort by the State of Florida to alter District 21 in response to *Miller*. All parties suggested that further litigation on the merits was the probable course. However, speaking on behalf of the Senate, attorney Benjamin H. Hill, III, suggested the possibility of mediation. After receiving the comments of counsel, the court concluded that mediation offered a preferable and feasible alternative to the uncomfortable intervention inherent in federal judicial resolution of issues affecting state government. Mediation began promptly.[1]

Consequent upon receipt of the information that the terms of a proposed resolution had congealed, a hearing was held on

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[1] Lawrence G. Mathews, Jr., of Orlando, Florida, was designated by the court as the mediator and was invested with broad discretion to conduct mediation in a manner and among persons determined by him to be necessary and proper to the resolution of the dispute. After some pronounced tribulation among the participants during the mediation, Mr. Mathews was able to report to the court the apparent consensual resolution of this dispute. A hearing was scheduled for September 27, 1995. As of that day, the House was neither a formal party to this action nor in agreement with the proposed resolution and C. Martin Lawyer, III, a plaintiff, asserted objections both to his continuing representation by the law firm of Foley & Lardner and to the putative settlement,. At the September 27 hearing, the three-judge panel decided to admit the House as a party and commit the action again to mediation in an effort to effect a plan in which all interested parties concurred. Mediation proceeded and, after some apparently exhaustive sessions, a proposed resolution resulted. The House now concurs with the proposed resolution. C. Martin Lawyer, III, objects to the proposed resolution.

November 2, 1995, at which the parties and members of the public were present. Florida's House and Senate as well as all other parties (except plaintiff Lawyer) manifested both the authority to consent and actual consent to the terms of the proposed resolution, which includes a modified configuration of District 21. At the November 2 hearing, the court discussed the pretrial statement submitted by the parties. In Exhibit B of the pretrial statement (Exhibit B is entitled "Plaintiff Martin Lawyer's Statement of the Case"), plaintiff Lawyer specifically adopts Exhibit A of the "Statement of the Case" submitted by plaintiff Scott and others. Exhibit A states in part that:

> As a result of the Supreme Court's decision in the *Miller* case, there are no issues of law to be decided by the Court in this matter. The instant action is directly analogous to, and therefore controlled by, the *Miller* opinion. *Accordingly, the only issue which should remain for the court to decide at the trial on this matter is the issue of the appropriate remedy.*

(Emphasis added.)

Accordingly, the court ruled as follows from the bench:

> [I]t seems to me clear beyond peradventure that there is no remaining litigable matter affecting the jurisdiction of the court to proceed to a remedial consideration of this controversy....[T]he issue perhaps then becomes one to be taken up at a fairness hearing....
>
> . . . .
>
> ...[W]e ought simply then to proceed on November the 20th at 9:30 a.m....to resolve the issue of the fairness of this proposed settlement and entertain any objections, including those from the plaintiff Lawyer or others, concerning the details of this district.

On November 20, 1995, the three-judge panel (with Chief Judge Tjoflat presiding) convened a "fairness" hearing to entertain argument from the parties, comments from the public, and any relevant evidence concerning the terms of the proposed resolution. This order emanates from the proceedings on November 20 at which the parties asked this court to authorize a restatement of the boundaries of District 21.

The redrawing of state legislative districts by a federal court presents several issues. The first issue pertinent in this case is the threshold evidence, stipulation, or the like necessary to activate the court's authority under the Fourteenth Amendment to compel the nullification and re-establishment of state legislative boundaries that were established after exhaustion of the procedures contemplated by Florida's constitution and by applicable federal statutes.

At pages 9-11 of the "brief of the United States in Support of Proposed Settlement," filed on September 26, 1995, and again at pages 1-4 of the "United States' Brief in support of Settlement Agreement of November 2, 1995," filed on November 17, 1995, the Attorney General outlines the basis for this court's enforcement of the parties' proposed resolution. Even if none of the cases cited by the Attorney General precisely mirrors the facts of this case, the fortifying principles are indistinguishable. A trial court in a case such as this may exercise authority under the Fourteenth Amendment if, after a careful evaluation of the terms of the proposed resolution and the details of the underlying dispute, the court concludes that the case presents a sufficient evidentiary and legal basis to warrant the *bona fide* intervention of a federal court into matters typically reserved to a state. In that circumstance, the State of Florida, the plaintiffs, and other participants may propose a resolution to this action without a dispositive, specific determina-

tion of the controlling constitutional issue. In other words, the State of Florida is at liberty, acting through its lawfully empowered officials, to consent to a legislative districting adjustment if (1) a material constitutional issue exists (that is, if a plausible and fairly contestable legal or factual issue underlies the dispute) and (2) the state prefers to act volitionally to avert both an expensive and protracted contest and the possibility of an adverse and disruptive adjudication.[2] As Justice O'Connor observes in the context of an employment discrimination case:

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[2] In this case, the dissenting plaintiff Lawyer now demands an adjudication that District 21 is composed unconstitutionally. However, the law allows for a consensual remedy in the absence of a public *mea culpa* by a litigant–as well it should. Of course, parties cannot connive to achieve narrow political interests by lodging complaints in a federal court, contriving to "settle" the litigation, and thereby affecting the interests of the public by manipulation of the federal judiciary. It is primarily for that reason that the court has a responsibility to telescopically inspect the controversy and guard against any disingenuous adventures. Among the adventures against which the court serves as a protector is the excessive (even intoxicating) acquisition of effective power over public affairs by a private individual with unspecified motives. In short, a court resolving a governmental or intrinsically public matter cannot act as a hostage to private interests. As stated in *Sheffield v. Itawamba County Board of Supervisors*, 439 F.2d 35, 36 (5th Cir. 1971):

> The appealing plaintiffs have been awarded the very relief they originally prayed for–a court order requiring the Board of Supervisors of Itawamba County to redistrict the county in conformity with legal standards. The appeal is provoked because plaintiffs now prefer that the order require the county to hold elections for the various supervisors' posts on a basis whereby candidates from each presently composed district could run in a county-wide election. *However, having instituted a public lawsuit to secure rectification for a constitutional wrong of wide dimension, they cannot privately determine its destiny.*

(Emphasis added). Plaintiff Lawyer's complaint sought to have the state of Florida replace District 21 with a constitutional district. He got it.

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law." The value of voluntary compliance is double important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.
>
> . . . .
>
> This conclusion is consistent with our previous decisions recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination. Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination.

Wygant v. Jackson Bd. of Education, 476 U.S. 267, 290-91, 106 S.Ct. 1842, 1855-56, 90 L.Ed. 2d 260, 279-80 (1986) (citations omitted) (emphasis in original [*sic*]).[3]

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[3] The special concurrence identifies from the motion to approve the settlement a statement that the "defendants 'do not admit liability'." The special concurrence not withstanding, an expanded recitation from the motion is revealing:

> While the defendants and defendant intervenors do not admit liability, they do admit for the purpose of settlement only that a reasonable factual and legal basis exists for plaintiffs' constitutional claim....

The Settlement Agreement similarly states in paragraphs 2, 3, and 4:

> Defendants and defendant-intervenors deny these assertions [of unconstitutionality]. The parties nonetheless do agree, for the purpose of settlement only, that based upon the evidence of record, there is a reasonable factual and legal basis for the plaintiffs' claim. The parties recognize that litigation of plaintiffs' claims will be expensive and time-consuming, and will entail significant risks for both sides, especially because of the unsettled nature of the law in this area. The parties further recognize that litigation of these claims is likely to be protracted, causing an undesirable uncertainty in the electoral process. In order to conserve resources, reduce risk, and obtain certainty and finality in the electoral process, the parties have agreed to resolve this dispute through compromise.

For these reasons, the parties (other than plaintiff Lawyer) entered the resolution. The reservation to which the special concurrence refers arises from the settling parties' concern that the three-judge panel might adopt a remedy materially departing from proposed District 21. If so, the defendants wanted to defend the present plan on the merits. (See transcript of November 2, 1995, at pp. 30-31.)

Each party either states unequivocally that existing District 21 is unconstitutionally configured or concedes, for purposes of settlement, that the plaintiffs have established *prima facie* unconstitutionality. The record contains a sufficient factual and legal basis to validate the conclusion that the plaintiff' claims are fairly litigable on the merits. The Florida legislature, the governmen-

The boundaries of current District 21 are markedly uneven and, in some respects, extraordinary (but not without precedent and certainly not the most extraordinary boundaries in Florida's Senate). Some legislators concede that awareness of race was not wholly absent from the formulation of District 21. The record confirms that the racial composition of District 21 is somewhat dissimilar from the racial composition of the larger, encompassing geographical area. These facts acquire controlling significance when evaluated in accordance with *Miller*, which states:

> Federal court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the Senate." Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. The courts, in assessing the sufficiency of a challenge to a distircting plan, must be sensitive to the complex

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tal body to which redistricting responsibilities are constitutionally delegated, has presented a palpably constitutional remedy. Under these circumstances, no specific adjudication of unconstitutionality is necessary.

Sound policy commends the majority's approach. The expressed conditions of the Florida legislature's participation in the resolution of this dispute include both (1) acceptance by the court of the adequacy of the *prima facie* legal standard (supported by the Department of Justice) and (2) adoption of a remedy not materially at variance from Plan 386. We are persuaded by Chief Judge Parker's opinion in *Moch v. East Baton Rouge Parish School Bd.*, 533 F.Supp. 556 (M.D. La. 1980), especial his insightful observation that "[i]f public bodies must admit guilt in order to settle [voting rights] cases, then settlements are going to be few and far between."

interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Miller v. Johnson, ___ U.S. ___, ___, 115 S.Ct. 2475, 2488, 132 L.Ed. 2d 762, ___ (1995).

Measured against the standard prescribed by *Miller*, the pleadings and other papers in this case present a *bona fide*,

justiciable, and fairly contestable dispute, which implicates important governmental interests and which the parties are at liberty to settle without risk of offense against the integrity of either the state's discretion in legislative districting or the federal court's authority attendant to the Fourteenth Amendment. In response to the dispute, the parties present for consideration a newly defined District 21, which is designated by the parties as Plan 386.

Miller directs that the governing constitutional issue includes due deference to both the ponderous task of legislative districting as well as to the wholesome consideration by publicly elected representatives of the meaning and definition of a community, i.e., a community of persons and a community of interests, both of which are evolving and only imprecisely measurable. The issue of community presents itself most prominently in this case because part of proposed District 21 is physically separated by a natural geological and geographical peculiarity (Tampa Bay) from the balance of the proposed district and because more than one county is included in proposed District 21.

Describing the notion of community is a stubborn problem. Viewed optimistically, a community is definable as individuals who sense among themselves a cohesiveness that they regard as prevailing over their cohesiveness with others. This cohesiveness may arise from numerous sources, both manifest and obscure, that include geography (which, as in this case with the politically inconvenient expanse of the waters of Tampa Bay, is often uneven and intrusive in its boundaries), history, tradition, religion, race, ethnicity, economics, and every other conceivable combination of chance, circumstance, time, and place. (Given the persistent disharmony among us, a community is perhaps more grimly definable as an array of persons who prefer disagreement among themselves to disagreement with others.) In any event, a community is based finally and unappealably on the society and consent of its members, both of which are known best by the community's members. A community is exactly what a community believe

itself to be. A community is--using the term "political" in the salutary sense--a political fact that candidates should study, officeholders must remember, and districting authorities would insinuate into their designs.

A constitutional and commendable factor in assessing the propriety of a legislative district is the society and consent of the members of that district and, to the extent applicable, of any included community. This is, after all, a republic, which implies a right in the people to accomplish their collective will and an obligation in the government to honor that will if the organic law permits. Therefore, notwithstanding the political aspirations of some or the schemes of others for improving the state of public affairs, the society and consent of a body politic comprising a community is a factor prominent among those factors that a court ought to evaluate in adopting a plan for redistricting. (This is not to say that the Constitution requires quiet contentment among every constituency. That may be unachievable. However, in searching for some unconstitutional iniquity, the consent or opposition of those touched by a matter is certainly a rational consideration.)

The Constitution neither prohibits the existence of a legislative district comprising the residents of a single community nor requires the dissection of a community because the community's residents are identifiable by some common bond, such as ethnicity, race, or religion. The Constitution does not forbid the combination or agglomeration of communities. The Constitution neither requires nor forbids districts contained in a single county (an impossibility in Florida). In fact, the constitution does not and could not require any particular district--that notion is preposterous. The constitution presumes to prescribe very few details. It suffices to say that the Constitution forbids districting motivated and dominated by the single-minded focus on a prohibited criterion, which in this case the plaintiffs allege is race.

Therefore, the conclusion is obvious that the plaintiffs sufficiently allege a cognizable, constitutional dispute concerning present District 21, which bears at least some of the conspicuous signs of a racially conscious contrivance. On the other hand, it is equally obvious that a cognizable, constitutional objection to the proposed District 21 is not established. In its shape and composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography.

The composition of District 21 has excited public discussion for many months. The news media have dispersed the story. The politicians have expostulated both locally and statewide. In contrast to the tradition arising from disputes among parties with only their discrete interests at stake, the mediation of this public dispute, which involves the public interest, has occurred in the light of public observation. All interested and willing persons have availed themselves of the opportunity to speak. Several court hearings have occurred. Most importantly, notice of the November 20 hearing on the terms of the proposed resolution was widely published and the details of the proposed resolution were published, generally known, and available in original and detailed form in the office of the clerk of this court. After public announcements and discussions, which included a dose of conspicuous disagreement among certain observers, the November 20 hearing produced but two dissenters, plaintiff Lawyer and a former state Senator, both of whom neither presented relevant evidence nor offered germane legal argument. Except for Lawyer, no resident of District 21 arose to object, despite Chief Judge Tjoflat's open invitation. Both common sense and the history of this litigation suggest that the residents of District 21 regard themselves as a community and experience considerable comfort with the proposed resolution. (Remarkably, even plaintiff Lawyer in his deposition attests to his contentment with the representation of Senator James Hargrett, the incumbent in District 21.)

Although the court notes the presumptive consent of the residents of District 21 to the terms of the proposed resolution, the governing fact remains that districting is a legislative function of the state, which yields to the federal courts only upon the identification of a constitutional defect (or perhaps in statutory matters not pertinent here). The federal courts are not constituted or authorized to determine (assuming hypothetically that judges possess the requisite wisdom) the best possible district for each place (assuming hypothetically that a "best possible district" exists). If jurisdiction is properly invoked, as in this case, the limited role of a federal court is to ascertain whether the legislatively described district is among that boundless number of possible and constitutional districts and not among the equally boundless number of possible and unconstitutional districts. The court approaches this formidable task with caution and sincere deference to legislative discretion.

Foremost among the factors commending the proposed resolution in this action is the consent of Florida's Senate and House, as well as the preclearance of the United States Department of Justice and the concurrence of Florida's Attorney General and Secretary of State. While assisted tellingly by mediation, proposed District 21, like present District 21, is primarily a legislative action and is advanced to this stage by this court preeminently for that reason. Section 16(a) of Article III of Florida's constitution provides that the legislature by joint resolution shall periodically reapportion itself. Absent an offense against the Constitution, this court necessarily respects the will of the legislature as manifested in this instance by the consent of both the President of Florida's Senate and the Speaker of Florida's House of Representatives.

Happily, there is much to commend the legislative solution expressed by the boundaries of proposed District 21 (Plan 386). Plan 386 is racially less recognizable and distinctive than present District 21, which is to say that Plan 386 reduces the percentage of minority constituents and more closely approximates the racial features of the larger geographic region surrounding Tampa Bay.

The boundaries of Plan 386 are less strained and irregular than present District 21. An observant and informed analyst of Plan 386 is not startled or impelled toward incredulity by the proposed district's configuration or composition. But most importantly, Plan 386 offers to any candidate, without regard to race, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat--neither of which is properly coerced or precluded by the state, the court, or the Constitution. Candidates should compete and either win or lose based on their talent, their good fortune, and their views. Nothing about Plan 386 is determinative of an electoral outcome--because of race or otherwise.

These perspectives, distilled from the record, are an encapsulated view by the court of the apparent wisdom of Plan 386. However, the legislature's view (not this court's view) of the wisdom of Plan 386 controls (absent a constitutional infirmity). The legislature makes the pertinent choice and the legislature has chosen Plan 386.

The court's limited review of Plan 386 concludes with approval--constitutional approval arising from applicable precedent and practical approval arising from an appreciation of the considerable legislative achievement writ large in Plan 386. Stated differently, considered both afresh and in light of the Supreme court's long history of apportionment decisions, particularly since *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962), Plan 386 passes any pertinent test of constitutionality and fairness.

For the reasons expressed, the court adjudges as follows:[4]

(1) The "Joint Motion to Approve Settlement" (Doc. 185) is GRANTED.

(2) All other pending motions are DENIED.

(3) Districts 13, 17, 19, 21, 22, and 23 are modified and redistricted, effective immediately, in accordance with the description, which is incorporated by reference into this order, appearing at Tab 14 of Exhibit 1 to the "Notice of Filing Declarations and Affidavits in Support of Settlement Agreement of November 2, 1995. (Doc. 188).

(4) The court retains jurisdiction pending further order for the limited purpose of assessing attorneys' fees and costs, if any.

ORDERED in Tampa, Florida, on March 19, 1996.

FOR THE PANEL

/s/_____
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

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[4] Because plaintiff Lawyer objects to Plan 386 (as well as to present District 21), this Final Order is not a typical, plenary consent decree that disposes of all aspects of liability and remedy by consent. Rather, it is in the nature of a hybrid consent decree that disposes of liability by consent and affords a remedy resulting from a partial settlement and an adversary hearing similar to a fairness hearing. Judge Rubin discusses hybrid consent decrees in *United States v. City of Miami, Fla.*, 664 F. 2d 435 (5th Cir. 1981) (en banc). *See generally Manual for Complex Litigation 3d.*, §§ 23.14 and 23.21 (1995).

TJOFLAT, Chief Circuit Judge, specially concurring:

I concur in the court's judgment incorporating as a remedy the redistricting plan for Senate District 21 proposed by the Florida legislature because I am convinced of two things. First, District 21, as presently drawn, is the product of racial gerrymandering and thus cannot be squared with the Equal Protection Clause of the Fourteenth Amendment. *See Miller v. Johnson*, ___ U.S. ___, 115 S.Ct. 2475, 132 L.Ed. 2d 762 (1995); *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed. 2d 511 (1993). Second, the legislature's proposed remedy is constitutional.

The majority believes that we can enter a final judgment in this case without deciding the threshold constitutional issue because (1) the defendants concede in their Joint Motion to approve Settlement that "a reasonable factual and legal basis exists for plaintiffs' constitutional claim," i.e., a *prima facie* claim exists, and (2) the defendants have agreed that the remedy the court adopts today is constitutional. The majority ignores the fact that, in their Joint Motion to Approve Settlement, the state defendants insist that they "do not admit liability."

As the majority acknowledges, the judgment the court enters today is not a consent judgment. *See White v. Alabama*, 74 F.3d 1058, 1073-74 (11th Cir. 1996). It therefore follows that, to enter the judgment in question, the court must find that District 21 is unconstitutional.[1] The court can do this without such a finding only if it treats the state defendants' Joint Motion as conceding the

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[1] A reader of the majority's order might conclude that my view has changed since the hearing held in this case on November 2, 1995. Such is not the case. I did not participate in the November 2 hearing; that hearing was presided over by Judge Merryday sitting alone.

issue of liability. Obviously, in the face of the explicit denial quoted above, the court cannot do that.[2]

I would resolve the issue of District 21's constitutionality on the record before us. The state defendants readily acknowledge the existence of a *prima facie* case of liability, and they have expressed no desire to contest this point by rebutting the plaintiffs' case. In short, the evidence in this case has been closed. It is if we have held a bench trial and taken the case under submission. Accordingly, were I writing for the majority, I would find that District 21 is the product of racial gerrymandering in violation of the Equal Protection Clause.

With respect to the remedy that this court should then impose, I subscribe in full to the majority's conclusion that the redistricting plan that the Florida legislature has proposed, and that we adopt today, is constitutional. I therefore concur in the court's final order.

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[2] The majority seems to read the settlement papers as containing the requisite concession of liability. *See ante* at [slip opin. 9] n.3. I do not agree with such a reading.

APPENDIX C

UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT SCOTT, EDNA SIMS, EARL JAMES, and C. MARTIN LAWYER, III,	*	
Plaintiffs,	*	Case No. 94-622-Civ-T-23-C
v..	*	
	*	THREE JUDGE COURT
THE UNITED STATES DEPARTMENT OF JUSTICE, by and through JANET RENO, Attorney General of the United States; *ET ALIA*,	*	
Defendants.	*	

****

PLAINTIFF MARTIN LAWYER'S MOTION TO DISAPPROVE NOVEMBER 2, 1995 "SETTLEMENT AGREEMENT"

Plaintiff C. MARTIN LAWYER, III hereby moves for the Court to disapprove the "Settlement Agreement" executed by counsel of the several parties and intervenors herein on November 2, 1995, upon grounds that the terms of the settlement, including its geographic configuration and its statistical census data for its

proposed Senate District 21 violate the principles of Movant's Equal Protection rights established by the recent Supreme Court case of *Miller v. Johnson*, __ U.S. ___, 132 L.Ed.2d 762, 115 S.Ct. ___ (1995).

MEMORANDUM IN SUPPORT OF MOTION

The latest "Settlement Agreement" suffers from the same constitutional infirmities as did the previous Settlement Agreement and as does the currently configured Senate District 21. That is, the architects of this plan have subordinated to racial considerations the "race-neutral districting principles of compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests". *Miller v. Johnson*, 515 U.S. ___, 132 L.Ed.2d 762, 779-780, 115 S.Ct. __ (1995).

The only reason that the proponents of this "Settlement Agreement" have for not respecting the race-neutral principle of the political subdivision of Hillsborough County and, instead, including Manatee and Pinellas Counties is to increase the percentage of Black voters. This is borne out very clearly in the statistics shown in the three Tables attached hereto as "Exhibit # 1", as well as in the statement of Justice Dept. counsel Steven Mulroy.

The statistics in the accompanying Tables show that the Settlement Plan District constitutes constitutionally-impermissible race-based districting from at least three perspectives. Underlying each of these perspectives is the fact that the actual percentage of Black Voting Age Population (V.A.P.) in each of the three counties included in the Settlement Plan is relatively small. In fact, in Hillsborough County, there are actually nearly 10,000 more Hispanic persons of voting age than Black persons.

First, then, we see that Black percentage of V.A.P. for the three counties in question is only 8.0%. In amazing contrast, the Settlement Plan contains a Black percentage of V.A.P. of 36.2%., or ***more than four times*** that of the general population of these three counties.

Second, for ***each*** county, the Settlement Plan increases the Black percentage of V.A.P. incredible amounts, which could only have resulted from race-based districting. In Hillsborough County, this percentage is increased by the Settlement Plan from 10.9% to 30.5%, a ***280% increase***. For Manatee County, the percentage is increased from 5.9% to 32.0%, a ***542% increase***. And, for Pinellas County, the percentage of Black V.A.P. is increased from 6.1% to 58.5%, an ***incredible increase of 959%***.

Third, Table # 3 indicates that the architects of the Settlement Plan went to extreme lengths to obtain extremely high percentages of all the Black persons of voting age within each county, especially in departing from Hillsborough County. Thus, in Pinellas County, which has a total of 700,203 potential voters, but only 42,713 potential Black voters, the Settlement Plan proponents have managed to include 64.4% of these Pinellas Black persons, or 27,524, within proposed District 21.

The Table # 3 figures for Manatee County are even more stark. The Settlement Plan includes 74.8% of that county's Black V.A.P. within proposed District 21, such that only 2,541 potential Black voters in the entire county are excluded from the District.

In addition to these very persuasive statistics, there is the statement of Mr. Mulroy, Justice Dept. counsel, that portions of counties other than Hillsborough had to be added to any district acceptable to Justice because the Black percentage of V.A.P. for Hillsborough County alone was too low. The undersigned, thus, respectfully asks the Court to inquire of Mr. Mulroy as to the Justice Department's reason for insisting that any "viable" plan extend beyond Hillsborough County.

Further, the Settlement Plan violates the spirit, if not the letter, of the race-neutral principal of contiguity in going over the unpopulated area of the Sunshine Skyway Bridge to include Pinellas County within the District. Thus, the Supreme Court in *Miller* cited with approval the finding of the District Court therein that

> it was 'exceedingly obvious' from the shape of the...District, together with the relevant racial demographics, that the *drawing of narrow land bridges* to incorporate within the district outlying appendages...was a deliberate attempt to bring black populations within the district.

132 L.Ed.2d at 780. Emphasis added.

In the same vein, the inclusion of those portions of both Manatee and Pinellas Counties violates the race-neutral principle of compactness as well. That is, compactness would have been achieved by expanding the area around the core of the Hillsborough County within the District.

Finally, one would be hard pressed to find an actual shared community of interest between Hillsborough County on the one hand and the putative portions of Manatee and Pinellas Counties on the other hand. As the Supreme Court stated, "Nor can the State's districting...be rescued by mere recitation of purported communities of interest." *Miller, supra* at 132 L.Ed.2d 781. "Where the State assumes from a group of a voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls, it engages in racial stereotyping at odds with equal protection mandates." *Id.* at 132 L.Ed. 782 (citations omitted).

The bottom line herein is found in the answer to the question, "Why did the proponents of the Settlement Plan include *these* portions of Manatee and Pinellas Counties within the District?" The only answer can be an intent to employ a Black-

maximization policy, which the Supreme Court in *Miller* harshly rebuked. The Court said, "The Justice Department's maximization policy seems quite far removed from" [the] purpose [of § 5 of the Voting Rights Act.]...There is no indication Congress intended such a far-reaching application of § 5...." *Id.* at 132 L.Ed.2d 786.

CONCLUSION

Since the terms of the proposed "Settlement Agreement" violate Movant's Equal Protection rights as set forth in *Miller v. Johnson*, 515 U.S. ____ , 132 L.Ed.2d 762, 115 S.Ct. ____ (1995), the Court should reject and disapprove the "Settlement Agreement".

/s/_____

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Table # 1 1990 COUNTY CENSUS DATA[1]

COUNTY	TOTAL V.A. POPULATION	BLACK V.A.P	HISP. V.A.P.	BLACK % V.A.P.	HISP. % V.A.P.
Hillsborough	631,780	68,864	78,341	10.9	12.4
Manatee	171,091	10,094	5,988	5.9	3.5
Pinellas	700,203	42,713	14,704	6.1	2.1
TOTAL	1,503,074	121,671	99,033	8.0	6.5

[1] The data in this Table are from "Lawyer Exhibit # 2" (entitled "County Statistics by District", at 3, 4) to "Plaintiff Martin Lawyer's Motion to Approve Proposed Redistricting Plan 'lawyer1_sen'". The figures for each county for Total Voting Age Population and for the Black and Hispanic % of V.A.P. are taken directly from said Exhibit. The figures for Black V.A.P. and Hispanic V.A.P. are derived from multiplying the respective percentage times the total V.A.P. for each county. For example, the figure for Black V.A.P. for Hillsborough County is obtained by multiplying 631,780 times .109.

Table # 2 SETTLEMENT PLAN CENSUS DATA[2]

COUNTY	TOTAL POPULATION	BLACK V.A.P	HISP. V.A.P.	BLACK % V.A.P.	HISP. % V.A.P.
Hillsborough	166,929	50,913	29,546	30.5	17.7
Manatee	23,603	7,553	2,478	32.0	10.5
Pinellas	47,050	27,524	847	58.5	1.8
TOTAL	237,582	85,990	32,871	36.2	13.9

[2] The data in this table are from charts of census data furnished by counsel for The Florida Senate in a document entitled "County Statistics by District" at 3. The figures for each column in this Table were derived in the same manner as in Table # 1.

Table # 3 SETTLEMENT PLAN BLACK VOTER CONCENTRATION[3]

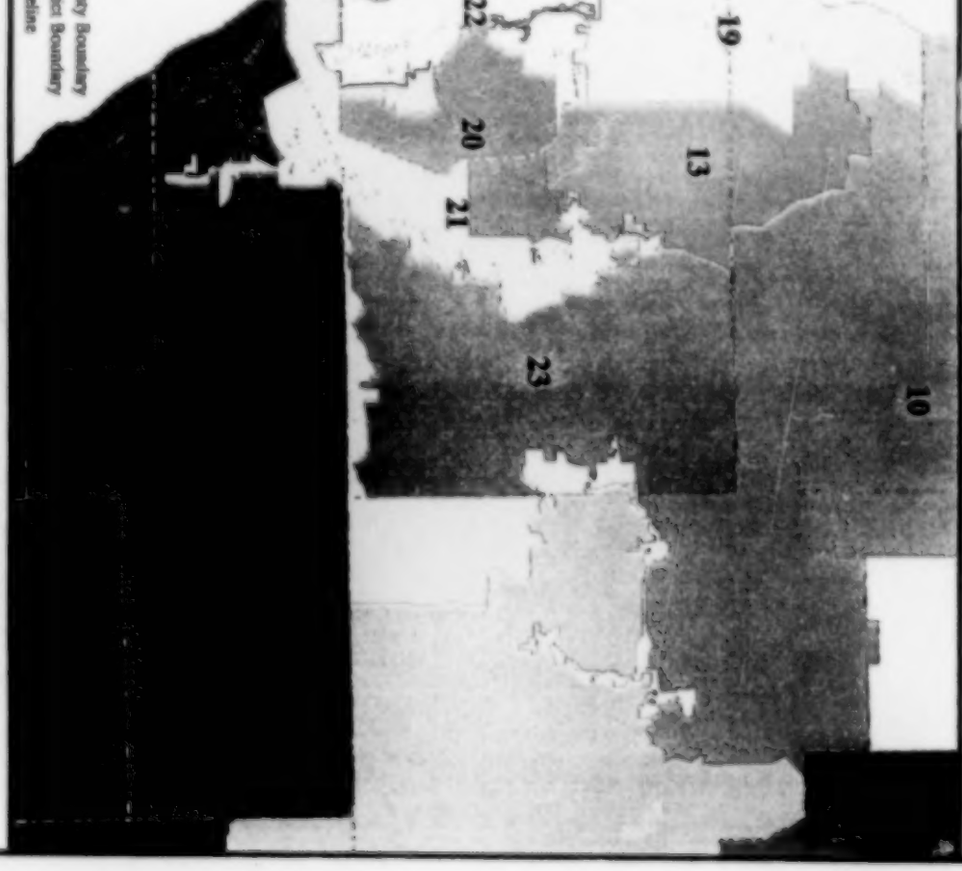
COUNTY	TOTAL BLACK V. A. P.	SETTLEMENT PLAN BLACK V.A.P.	% OF COUNTY'S BLACK VOTERS IN SETTLEMENT PLAN
Hillsborough	68,864	50, 913	73.9
Manatee	10,094	7,553	74.8
Pinellas	42,713	27,524	64.4

EXHIBIT # 1

[S21\state]

[3] The data in this Table are derived from Tables # 1 and # 2. That is, the column entitled Total Black V.A.P. in Table # 3 is the same as the column entitled Black V.A.P. in Table # 1; and the column entitled Settlement Plan Black V.A.P. in Table # 3 is the same as the column entitled Black V.A.P. in Table # 2. The final column in Table # 3 is derived from dividing the third column by the second column. For example, for Hillsborough County, the Settlement Plan Black V.A.P. of 50,913 is divided by the Total Black V.A.P. of 68,864, yielding 73.9%.

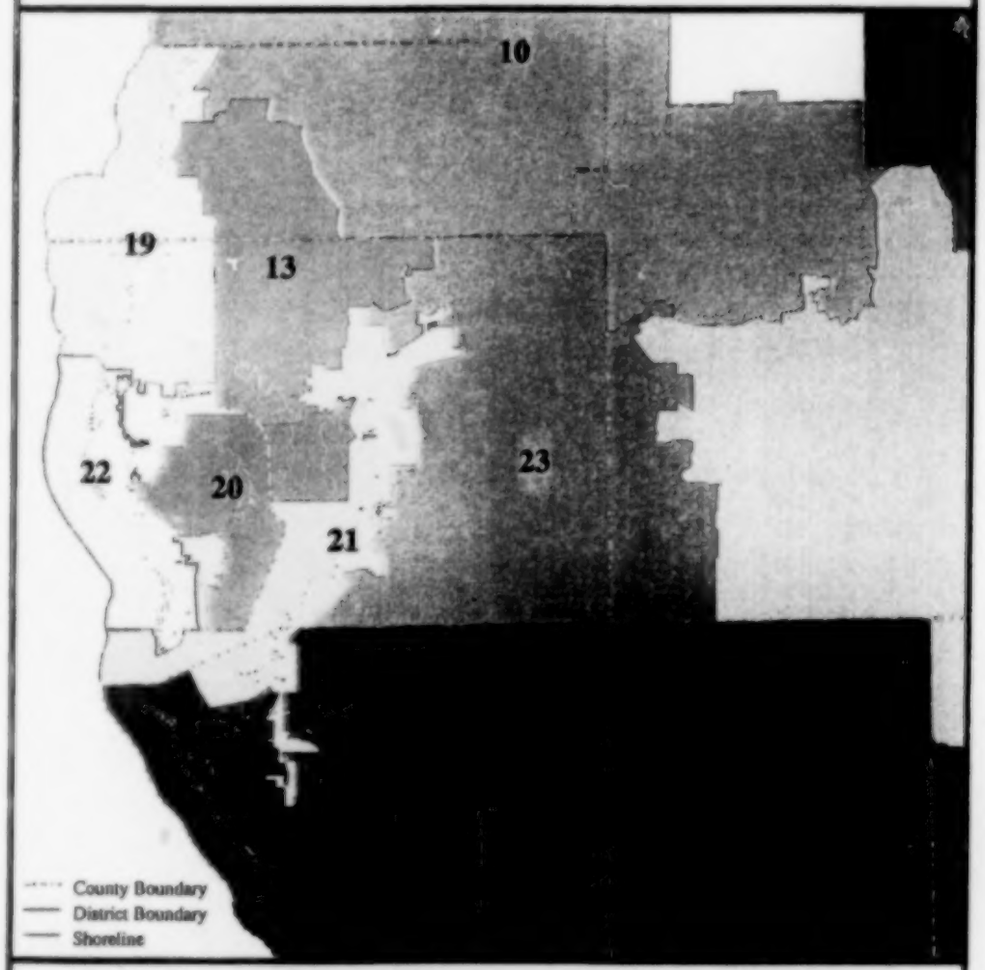
1992 SENATE PLAN 330 TAMPA BAY AREA



JLMC Economic and Demographic Research Division

Appendix D

1996 SENATE
PLAN 386
TAMPA BAY AREA



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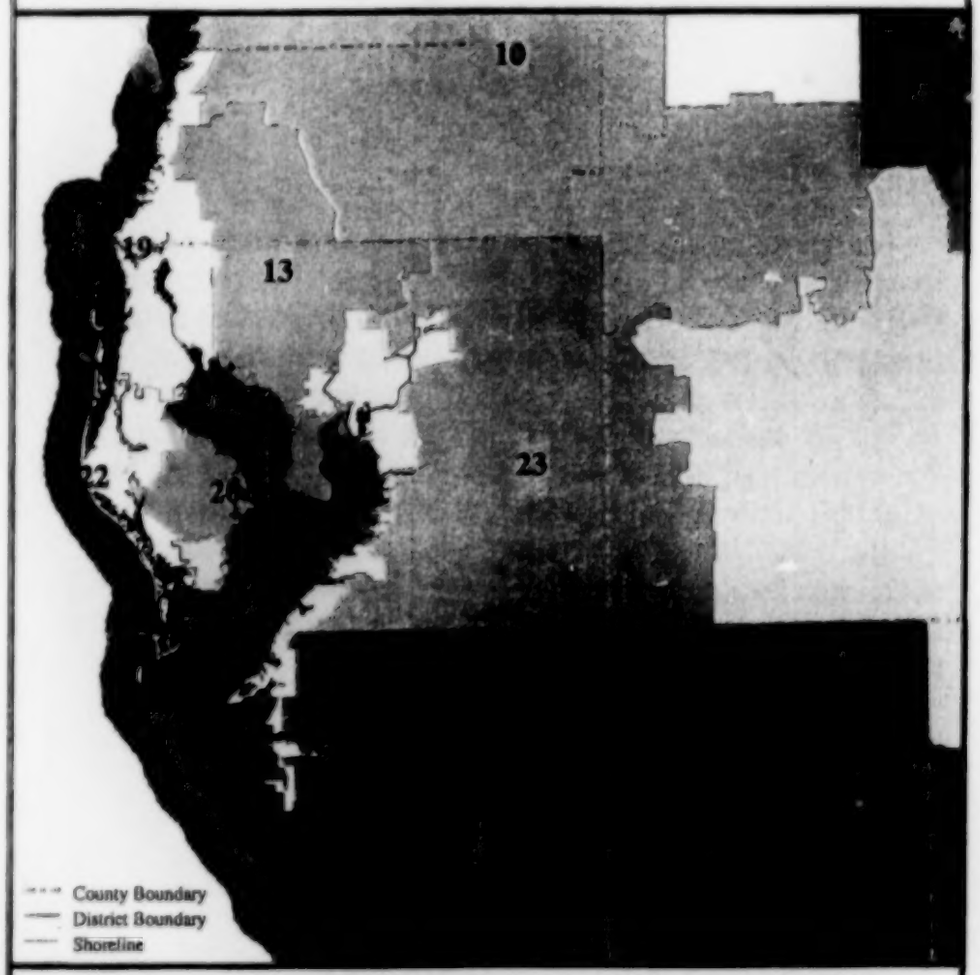
1996 SENATE
PLAN 386
TAMPA BAY AREA



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Appendix F

APPENDIX G

CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE III, Section 7

Passage of Bills

Any bill may originate in either house and after passage in one may be amended in the other. It shall be read in each house on three separate days, unless this rule is waived by two-thirds vote; provided the publication of its title in the journal of a house shall satisfy the requirement for the first reading in that house. On each reading, it shall be read by title only, unless one-third of the members present desire it read in full. On final passage, the vote of each member voting shall be entered on the journal. Passage of a bill shall require a majority vote in each house. Each bill and joint resolution shall be signed by the presiding officers of the respective houses and by the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment sine die.

APPENDIX H

CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE III, Section 8

Executive Approval and Veto

(a) Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days to act from the date of presentation to act on the bill. In all cases except general appropriation bills, the veto shall extend to the entire bill. The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.

(b) When a bill or any specific appropriation of a general appropriation bill has been vetoed by the governor, he shall transmit his signed objections thereto to the house in which the bill originated if in session. If that house is not in session, he shall file them with the secretary of state, who shall lay them before that house at its next regular or special session, and they shall be entered on its journal.

(c) If each house shall, by a two-thirds vote, re-enact the bill or reinstate the vetoed specific appropriation of a general appropriation bill, the vote of each member voting shall be entered on the respective journals, and the bill shall become law or the specific appropriation reinstated, the veto notwithstanding.

APPENDIX I

CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE III, Section 16

Legislative Apportionment

(a) SENATORIAL AND REPRESENTATIVE DISTRICTS.

The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hindered twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment of apportionment.

(b) FAILURE OF LEGISLATURE TO APPORTION; JUDICIAL REAPPORTIONMENT.

In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, the attorney general shall, within five days, petition the supreme court of the state to make such apportionment. No later than the sixtieth day after the filing of such petition, the supreme court shall file with the secretary of state an order making such apportionment.

(c) JUDICIAL REVIEW OF APPORTIONMENT.

Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) EFFECT OF JUDGMENT IN APPORTIONMENT; EXTRAORDINARY APPORTIONMENT SESSION.

A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.

(e) EXTRAORDINARY APPORTIONMENT SESSION: REVIEW OF APPORTIONMENT.

Within fifteen days after the adjournment of an extraordinary apportionment session, the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment shall be had as provided for in cases of such joint resolution adopted a regular or special apportionment session.

(f) JUDICIAL REAPPORTIONMENT.

Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court determine that the apportionment made is invalid, the court shall, not later than sixty days after receiving the petition of the attorney general, file with the secretary of state an order making such apportionment.